No. 89-1392

In The

# Supreme Court Of The United States

OCTOBER TERM, 1989

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW YORK CITY HEALTH & HOSPITALS CORP.,
*Petitioners,*

vs.

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Resources,
*Respondent.*

On Writ of Certiorari To
The United States Court of Appeals
For the Second Circuit

## Brief of The Rutherford Institute and The Rutherford Institutes of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin, *Amici Curiae*, In Support of Respondent

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## INTEREST OF *AMICI CURIAE*[1]

This is not a First Amendment or right of privacy case. This case does, nevertheless, present important issues concerning the right of Congress and the Secretary of Health and Human Services (the "Secretary") to establish a national public policy favoring child birth over abortion by prohibiting Title X projects from using federal funds to support and advance abortion.

The Petitioners seek to overturn legislative and regulatory restrictions on the use of public funds to perform or advocate the performance of abortions on unborn children. Petitioners request the Court to substitute their own narrow commercial interests for the

[1]Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

clearly stated public policy of the Government which chooses to support child birth over abortion.

Petitioners' view of the statute and regulations promulgated thereunder would force the United States Government into taking a position favoring the funding of abortions in situations other than "family planning" and the public funding and support of abortion advocacy, lobbying, promotion and related abortion legal action.

The Rutherford Institute believes that this case presents significant questions of the authority of Congress and the Secretary to effectuate national public policy on the funding of abortion and related abortion services and advocacy. This case also presents the Court with the opportunity to affirm the national public policy of non-government funding of abortion and abortion related services and advocacy in favor of child bearing.

This Court's decision is of great significance since the authority of Executive Branch agencies to interpret Congressional intent, promulgate regulations and enforce prohibitions and restrictions on federal funding is in question. The national interests are best served by affirming the Second Circuit's decision finding that the Regulations are a permissible construction of Congressional intent as expressed in Section 1008 of 42 U.S.C. §300a-6 to favor child birth over abortion.

*Amici Curiae* are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish divine and Rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin and its national office in Charlottesville, Virginia, the Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the sanctity of life. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.



## STATEMENT OF FACTS

*Amici Curiae* adopt by reference the statement of facts as set forth in Respondent's Brief filed with this Court.

## SUMMARY OF ARGUMENT

Congress has expressed its intent that Title X funds be used to favor childbearing over abortion. §1008 of 42 U.S.C. §300a-6 (1982 & Supp. V 1987). At no point have petitioners challenged the constitutionality of §1008. Instead, Petitioners have asserted a flawed, narrow constitutional challenge to the Regulations only. Petitioners' failure to challenge the constitutionality of §1008 precludes their ability to raise constitutional challenges to the Regulations adopted pursuant to §1008, since this Court will not reach that question without first determining that the Regulations are a valid exercise of the Secretary's authority granted by §1008. If such Regulations are the product of a valid exercise, there can be no valid corresponding challenge to the Regulations promulgated thereunder.

Petitioners have good reason not to challenge the constitutionality of §1008. This Court has twice upheld similar governmental restrictions on funding for abortions. *Maher v. Roe*, 432 U.S. 464 (1977). *Harris v. McRay*, 448 U.S. 297 (1980). In *Maher* this Court concluded that the government is free to adopt a policy choice which encourages child birth over abortion without fear of constitutional violation. A state need not show a compelling interest to support such a value judgment. A similar policy statement, expressed through the Hyde Amendment, was upheld by this Court in *Harris*, which affirmed the government's ability to encourage alternative activity deemed in the public interest by unequal subsidizing of abortion and other medical services. Like the Hyde Amendment, §1008 and the Regulations in question bear a rational relationship to the State's legitimate interest in protecting potential life.

Congress has a right to encourage, through the taxing and spending clause, any activity or conduct it wishes. Congress's intention to develop a national policy favoring childbirth over abortion and restricting the use of federal funds for abortion and its related expenses, is expressed not only in §1001, but also in the Hyde Amendments

to Medicaid funding, *Harris*, and in sections of the Civil Rights Restoration Act of 1987. Petitioners fail to understand the critical distinction between Congress's right to encourage or promote activities which Congress deems in our nation's best interest, and Congress's power to absolutely prohibit a right protected by the Constitution.

Petitioners are incorrect in their assertion that this case presents a First Amendment issue. The Regulations do not restrict Petitioners' speech unless it is financially supported by the *use of federal funds*. Thus, Petitioners mislead the Court by erroneously characterizing the speech question as whether Petitioners may speak about abortion. Rather, the correct question is whether Title X projects may utilize federal funds to financially support abortion speech through abortion advocacy and counseling. This proper question is answered in the negative by the Secretary's Regulations, which do no more than reasonably establish detailed guidelines to effectuate Congress's intent to promote childbirth over abortion. Petitioners are urging this Court to rewrite public policy by forcing Congress to use public funds to encourage abortion.

Petitioners futilely strain the legislation's clear language in order to support their contentions that the Regulations restrict Petitioners in ways in which the express reading of the Regulations do not. Similarly unsupported are Petitioners' claims that the Regulations are vague, overbroad, arbitrary and capricious. Vagueness and overbreadth arguments are strikingly similar to arguments previously rejected by this Court. *Bob Jones University v. United States*, 461 U.S. 574 (1983). Since the Regulations in question are in furtherance of Congress's clearly expressed national policy of nongovernment funding of abortions, they are not arbitrary and capricious and withstand Petitioners' challenge.



## ARGUMENT

### I. PETITIONERS HAVE WAIVED ALL CONSTITUTIONAL CHALLENGES TO THE REGULATIONS.

Section 1008 of 42 U.S.C. §300a-6 of Title X of the Public Health Service Act (hereinafter referred to as "Title X"), states:

> None of the funds appropriated under this subchapter shall be *used* in any programs where abortion is a method of family planning.

42 U.S.C. §300a-6 (emphasis added) (hereinafter referred to simply as "§1008"). This law expresses Congress' intent that Title X funds shall be used to favor child bearing over abortion. Initially, §1008 does not define the term "used." For instance – contrary to Petitioners' claims – §1008 does not say "used to perform an abortion procedure." It says broadly "used" and with no modifying words. The verb "used" should be construed broadly and is clearly related to the "abortion" activities restricted in the "programs" in question. More importantly to the constitutional question, Petitioners failed to build the necessary foundation for their constitutional claims.

Petitioners neglected to challenge the constitutionality of §1008 at any stage of these legal proceedings. Petitioners assert a very narrow constitutional challenge to the Regulations only -- not §1008. Petitioners' narrow challenge is flawed. Petitioners' failure to challenge the constitutionality of §1008 waives Petitioners' claim that the Regulations are unconstitutional in that this Court will not reach that question without first determining that the Regulations are a valid exercise of the Secretary's authority granted by §1008. If the Regulations are a valid exercise of the Secretary's authority given to him by Congress through §1008, then, since there is not constitutional challenge to §1008, there can be no valid corresponding challenge to the Regulations promulgated thereunder. The Court should not reach the constitutional question unless the Regulations are first found to be invalid, in which case, the underlying statute giving the Secretary authority (i.e., §1008) becomes the subject of constitutional inquiry. However, Petitioners have not asked the Court to review the constitutionality of §1008. Thus, all constitutional claims are waived.

Moreover, Petitioners had good reason not to claim §1008 was constitutionally infirm since this Court has twice upheld similar governmental restrictions on funding for abortions.

## II. NEITHER §1008 NOR THE REGULATIONS ARE UNCONSTITUTIONAL SINCE BOTH FURTHER A GOVERNMENTAL INTEREST IN FAVORING CHILD BIRTH OVER ABORTION.

In *Maher v. Roe*, 432 U.S. 464 (1977), this Court rejected a complaint from two indigent women that a Connecticut regulation requiring a physician's certificate of medical necessity was inconsistent with the requirements of Title XIX of the Social Security Act and violated the indigent women's Fourteenth Amendment guarantees of due process and equal protection. While not retreating from its prior decision in *Roe* – which struck down a state's attempt to absolutely prohibit a woman's right to an abortion – this Court was clear in its pronouncement that:

> [T]he Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents.

432 U.S. at 469. Equally, this Court rejected the indigent women's claim that their "financial need" identifies them as a suspect class for purposes of equal protection analysis. 432 U.S. at 471.

Contrary to the construction of *Roe v. Wade*, 410 U.S. 113 (1973), argued by Petitioners in *Maher*, this Court upheld the governmental action because there was "no limitation on the authority of a State to make a value judgment favoring child birth over abortion, and to implement that judgment by allocation of public funds." *Maher*, 432 U.S. at 474. This Court emphasized that there is a basic difference between direct state interference with a protected activity – the right to abortion – and state encouragement of an alternative activity – child birth – consonant with legislative policy. *Maher*, 432 U.S. at 475. Thus, the government is free to adopt a policy choice of encouraging child birth over abortion without fear of constitutional violation. As such, this Court concluded that "[w]e think it abundantly clear that a State is not required to show a compelling interest for its



policy choice to favor normal child birth any more than a State must so justify its election to fund public but not private education." *Maher*, 432 U.S. at 477.

Both in the case at bar and in *Maher*, suit was brought challenging a regulation promulgated pursuant to a state statute which reflected the government's public policy. The Connecticut regulation in *Maher* required an indigent woman to obtain a physician's certificate of "medical necessity" before she could obtain a publicly-funded abortion. The Regulations here restrict Title X programs from advocating – through referrals, counseling, lobbying, advertising or encouragement – abortion in favor of child birth. This Court concluded in *Maher* that the regulation was reasonable "to insure that its money is being spent only for authorized purposes." Here, as in *Maher*, the Regulations are rationally related to the public policy choice of favoring child birth over abortion.

Three years after *Maher*, the Court again considered a similar policy statement expressed through the Hyde Amendment in *Harris v. McRay*, 448 U.S. 297 (1980). Physicians who perform abortions for Medicaid recipients and recipients of those services, among others, brought suit challenging, *inter alia*, the constitutionality of the Hyde Amendment to Title XIX. The Hyde Amendment effectively prohibited federal funding through Title XIX to the Social Security Act for abortions except under certain limited circumstances. Plaintiffs challenged the Hyde Amendment as an unconstitutional interference with a "woman's right to an abortion." This Court rejected that contention stating:

> The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher places no governmental obstacle* in the path of a woman who chooses to terminate her pregnancy, but rather by means of unequal subsidization of abortion and other medical services, *encourages alternative activity deemed in the public interest.*

448 U.S. at 315 (emphasis added).

This Court correctly rejected the exactly same contention made by Petitioners here that denial of funding for an abortion violates *Roe*.

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . .The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. . . .We are, thus, not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.

448 U.S. 316-317. The Hyde Amendment, like §1008 and the Regulations in question here, bears a rational relationship to the State's legitimate interest in protecting potential life. 448 U.S. at 324.

It is not surprising, therefore, that in light of this Court's prior decision in *Maher* and *Harris* the Petitioners here did not challenge the constitutionality of §1008. Nevertheless, Petitioners' failure to challenge the constitutionality of §1008 precludes the Petitioners' ability to raise constitutional challenges to the Regulations adopted pursuant to §1008. If this Court determines that the Secretary's Regulations in question were adopted pursuant to the Secretary's authority to enforce and implement §1008, and because §1008 is admitted – by acquiescence of the Petitioners – to be constitutional, then the constitutionality of the Regulations is established as a matter of law. Consequently, the constitutional challenges to the Regulations have not been properly asserted by Petitioners and the Court need only address the authority of the Secretary to issue the Regulations in furtherance of his obligations to follow Congressional intent as stated in §1008.

## III. IT IS THE NATIONAL PUBLIC POLICY TO FAVOR CHILD BIRTH OVER ABORTION AND TO PROHIBIT THE USE OF GOVERNMENT MONEY FOR ABORTION AND ABORTION-RELATED ACTIVITIES.

Congress' power to tax and spend is derived from Article I, §8 of the United States Constitution. Petitioners, obviously, do not



challenge this right. Included in the right to spend is the right to develop a national policy with respect to how federal funds will be used. Clearly, Congress and the Executive Branch have the right to develop a national policy concerning what activities the United States government will financially support. For many years Congress has expressed a national public policy against the funding of abortions and its related activities and in favor of child birth. Despite the fact that Congress cannot absolutely prohibit a woman from obtaining an abortion – the holding of *Roe* – it simply does not follow that Congress cannot, through the spending power of the Constitution, choose, as a matter of public policy, to encourage an activity that is the antithesis of abortion – child birth. Thus, Congress has a right to encourage, through the taxing and spending clause, any activity or conduct it wishes without regard to whether it may be the converse of a right protected by the Constitution.

Petitioners' arguments are fundamentally flawed because Petitioners fail to understand the distinction between Congress' right to encourage or promote activities (which Congress deems in the best interest of our nation) as opposed to Congress' power to absolutely prohibit a right protected by the Constitution. The distinction here is critical! Petitioners posit that because Congress and the Secretary, through his Regulations, have expressed a national policy favoring child birth over abortion, and have placed restrictions on Title X programs receiving federal funds being allowed to engage in advocacy and counseling which is contrary to the national public policy of favoring child birth, that Congress and the Secretary – through the Regulations – are constitutionally infirm. Petitioners' arguments have no merit.

Congress' intention to develop a national policy favoring child birth over abortion and restricting the use of federal funds for abortion and its related services, is expressed not only in §1001 but equally in the Hyde Amendment(s) to Medicaid funding, *Harris*; and, two sections of the Civil Rights Restoration Act of 1987.

### A. The Hyde Amendments

The Hyde Amendments have been a part of Congress' amendments to the appropriations bill for the Department of Health, Educa-

tion and Welfare — Title XIX — since 1976. Either by use of an amendment or by joint resolution, funds allocated under Title XIX may not be used to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. As part of different appropriation bills and at different times, the language of the restriction for abortions has changed. Nevertheless, the overall policy expression of the Hyde Amendments is clear — public monies will not be used to fund abortions. *See Harris v. McCray*, 448 U.S. at 301-304.

### B. The Civil Rights Restoration Act of 1987.

In addition to the initial adoption and readoption of various forms of what has commonly been referred to as the Hyde Amendment to the Medicaid Funding Bill and Congress' express prohibition of funding abortions within Title X projects — §1008 — Congress has recently extended and affirmed the nation's public policy concerning neutrality with respect to abortion and abortion funding in two sections of the Civil Rights Restoration Act of 1987. In the adoption of the "Civil Rights Restoration Act of 1987," Public Law 100-259, Congress stated a public policy on use of public funds for abortions and related activities. Section 3 of the Civil Rights Restoration Act of 1987 creates a new Section 909 of Title IX of the Education Amendment Act of 1972 as follows:

> SEC. 909. Nothing in this Title shall be construed to require or prohibit any person, or public or private entity, to provide for or provide any benefit or service, including the use of facilities, related to an abortion. Nothing in this Section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

102 STAT 29. Section 8 of the Civil Rights Restoration Act provides an all encompassing view of Congress' policy towards governmental abortion funding. Section 8 provides:

> No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity *receiving Federal Funds* to perform or pay for an abortion.



102 STAT. 31 (emphasis supplied).

Congress has consistently favored child birth over abortion when deciding how public monies will be spent. Congress has never authorized the use of public funds to perform abortions or to engage in abortion-related advocacy and activities. Congress has consistently maintained a position of prohibiting the use of public funds for the performance of an abortion or abortion-related services. This is the national public policy. The Regulations in question here merely reflect a clear national public policy of not funding abortion and its related activities; but, instead, of encouraging child birth.

## IV. PETITIONERS' COMMERCIAL SPEECH CLAIM IS FLAWED.

Petitioners' complaint that the Regulations impose impermissible burdens on the speech rights of medical professionals when advising women about the alternative of abortion is fatally flawed. First, as noted previously, Petitioners have failed to challenge §1008. Thus, the Regulations promulgated pursuant to a statute are constitutional since they are otherwise a valid implementation of §1008. In summary, either the Regulations are a valid exercise of the Secretary's authority derived from §1008 and, therefore, are constitutional, or the Regulations are invalid because the Secretary has exceeded Congressional authority under §1008 and the Court will never reach the constitutional question.

Second, and more importantly, even if the Court is to consider Petitioners' speech clause argument, the speech in question — commercial speech — does not enjoy the level of constitutional protection as speech on matters of public concern. Petitioners have failed to cite any authority in support of their expansive First Amendment view that Congress and the Secretary are forbidden by the First Amendment to place restrictions on the use of federal funds to engage in advocacy and speech which is contrary to the national public policy on abortion.

Petitioners mislead the Court by erroneously characterizing the speech question. The question is *not* whether Petitioners may speak about abortions. Rather, the correct question is whether Title X projects may *use federal funds* to financially support abortion speech through abortion advocacy and counseling. Clearly, Congress and the

Secretary have a right to prohibit federal funding of speech and advocacy about abortion and to favor child birth over abortion as a matter of national public policy. Petitioners urge the Court to force Congress and the Secretary to adopt Petitioners' view of public policy concerning the abortion issue. Petitioners also urge the Court to rewrite public policy by forcing Congress to use public funds to support Petitioners' abortion counseling, abortion promotion, abortion advertising, abortion advocacy, abortion lobbying, and abortion related advocacy and legal suits. Petitioners, moreover, fail to explain this Court's authority to order Congress and the Executive Branch to adopt a public policy supporting the use of public funds for abortion and abortion-related activities. The reason for this is that none exist.

Petitioners' view of the Regulations concerning speech in non-Title X projects is erroneous. The Regulations do not restrict Petitioners' speech unless it is financially supported by the *use of federal funds*. What Petitioners do without federal funding is not covered by the Regulations. Thus, Petitioners may advocate at will their beliefs in the merits of abortion over child birth so long as they do not "use" federal funds to do so. Thus, there is no real First Amendment issue presented by this case.

If Petitioners' view of the speech question is correct, the government would never be permitted to impede speech of its employees even during the work day and while on the job because, in Petitioners' view, all speech is absolute and can never be restricted even if the government may be perceived as endorsing the speech through a government employee's solicitation of a political contribution while on the job, or as in this instance, through a federally-supported health care provider's use of Title X funds to encourage and promote abortion over child birth. If nothing else, the perception of governmental endorsement of abortion over childbirth is crucial.

Congress and the Secretary have clearly held a governmental interest in avoiding the perception to the public that the government encourages abortion over child birth. Thus, Congress and the Secretary have clear governmental interests in adopting laws and regulations which will prevent the perception to a reasonable observer that the government is funding abortions, abortion counseling, abortion referral, abortion advocacy, or any other aspect of the abortion



issue. The Secretary's Regulations in question do no more than reasonably establish the detailed guidelines to effectuate Congress' intent to promote child birth over abortion.

## V. THE PLAIN READING OF THE REGULATIONS DO NOT SUPPORT THE STRAINED CONCLUSIONS RAISED BY PETITIONERS.

### 1. §59.9

Petitioners' and Justice Bownes' analyses of §59.9 of the Regulations are flawed. For instance, Justice Bownes states:

> . . .It [Section 59.9] states that projects ***must*** have "an objective integrity and independence which reaches beyond separate bookkeeping to ***include*** separation of accounting records, facilities and personnel and to require separate signs for the federally and non-federally funded activities."

*Com. of Mass. v. Secretary of Health and Human Serv.*, 873 F.2d 1528, 1531 (1st Cir. 1989) (emphasis added). A plain reading of §59.9 shows that while "objective integrity and independence" is the Secretary's goal, the regulation does *not require* separate accounting records, separate personnel, and separate signs. Regulation 59.9 states:

> A Title X project must be organized so that it is physically and financially separate, as defined in accordance with the review established in this section, from activities which are prohibited under Section 1008 of the Act and Section 59.8 and Section 59.10 of these Regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exists based on a review of fact and circumstances. Factors relevant to this determination shall include (but are not limited to):
>
> (a) The existence of separate accounting records;

(b) the degree of separation from facilities (e.g., treatment, consultation, examination and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

Factors relevant to a review of the objective integrity and independence from prohibited activities do not rise to the level of mandatory regulatory requirements as posited by Petitioners and Justice Bownes.

Equally, Justice Bownes' conclusion concerning Section 59.9 is flatly wrong! The existence of separate accounting records, the degree of separation of facilities, the existence of separate personnel, and the existence of identifying signs are merely ***factors*** for the Secretary's consideration in determining whether the program has achieved objective integrity and independence from activities that are prohibited by law.

Section 59.9's requirement that the Title X project be physically separated from prohibited activities is clearly to (i) insure the integrity and compliance with Congress' express restriction on the use of federal funds for abortions, and (ii) to prevent the image or illusion of governmental endorsement of abortion as a method of family planning. Both goals are laudable and clearly within the penumbra of §1008's restrictions. Integrity of Title X facilities is clearly not only a goal of the Secretary, but an absolute demand on the Secretary by the requirements of §1008. Likewise, the perception of governmental endorsement and funding of abortions is a legitimate governmental concern just as the perception of governmental endorsement and sponsorship of religion is a compelling concern. In both instances, the government has compelling reasons to prevent the perception of endorsement of the activity — be it abortion or religion.



Segregated accounting records are not an absolute requirement under Section 59.9 but will be a "factor" in the Secretary's determination of the program's compliance with §1008. The prior regulation required the provider to maintain separate bookkeeping. Separate bookkeeping, nevertheless, permits a great deal of discretion by the program in the allocation of costs. Therefore, in order to establish objective — as opposed to subjective — integrity and independence from proscribed activities, the Secretary has provided Title X projects with an objective factor — separate accounting records — that the Secretary will review in determining compliance with §1008. Separate accounting records is a laudable factor to since (i) it is objective, (ii) adds objectivity to Title X audits for both the Secretary and the Title VII project, and (iii) it prohibits creativity in discretionary allocations of depreciation, amortization, and allocations to specific expense categories by the Title VII's accountants.

Separation of personnel, like separate accounting records, increases the likelihood of a Title X project's objective compliance with §1008. Separation of personnel is merely aimed at the goal of advancing integrity and objectivity to the enforcement of §1008 and eliminating the inevitable subjective judgments requiring an allocation of an employee's, supervisor's, receptionist's, or director's time to funded and non-funded programs. Without a time clock, stopwatch, and constant observer, the Secretary would be hard pressed to challenge a program's discretionary allocation of its personnel's time and expenses between funded and non-funded programs. Again, the existence of separate personnel is not a requirement but is a *factor* in the Secretary's determination of the program's compliance with the law. Rather than legally challenging the Secretary's objective factors, Title X providers should have applauded the Secretary for giving them objective guidance in how the Secretary will enforce the restrictions of §1008. Without Section 59.9's factors, Title X providers would have no way of knowing how the Secretary would determine objective integrity and independence for purposes of enforcing Congress' §1008 restrictions. In conclusion, the Petitioners' and Justice Bownes' understanding of §59.9 is erroneous and leads to unsubstantiated concerns about enforcement proceedings and activities that will never materialize. The plain reading of the language of §59.9 does not support the conclusions reached by Petitioners and Justice Bownes.

2. §59.10

Petitioners' and Justice Bownes' analysis of Section 59.10 is equally flawed. Justice Bownes' opinion states:

> Finally, section 59.10 lists a *series of prohibited activities* including lobbying for pro-choice legislation, providing speakers to promote the availability of abortion, paying dues to groups which advocate abortion and engaging in legal action or developing and disseminating materials to promote abortion as an option in the case of an intended pregnancy.

*Com. of Mass.*, 873 F.2d at 1531 (emphasis added).

Contrary to Petitioners' and Justice Bownes' flawed reading of §59.10, a Title X provider is *not* prohibited from engaging in "lobbying for pro-choice legislation, providing speakers to promote the availability of abortion, paying dues to groups which advocate abortion, and engaging in legal action or developing and disseminating materials to promote abortion." A Title X provider can do all of the these activities provided that the Title X provider does not use Title X project *funds* for such activity. Justice Bownes totally ignores the distinction between the activities of "an organization [which] conducts a number of activities, including operating a Title X project" and the use of Title X funds. The distinction is obviously significant.

Section 59.10 clearly distinguishes between "the use of Title X project funds" and the activities of "an organization" which, among many of its activities, operates a Title X project. It is the use of Title X funds, and not the identity of the organization or its personnel, which triggers the prohibitions of Section 59.10. Justice Bownes egregiously misconstrues the clearly stated language of §59.10.

Section 59.10 makes the distinction between the use of funds and other activities clear by providing examples to Title X providers of activities that would *not* violate Section 59.10. Thus, the payment of non-project funds for dues to an association which engages in lobbying and to protect and expand the availability of abortion is *not* a violation of Section 59.10. A Title X provider who engages in lobbying to increase the legal availability of abortion but who does not use Title X project facilities or funds for such activity is not in



violation of Section 59.10. Employees of a Title X project who petition their legislative representatives for laws seeking to expand the legal availability of abortion and use no Title X funds to engage in such lobbying are not in violation of Section 59.10. A Title X project employee who speaks before a legislative body in support of abortion and who is not reimbursed for such expenses by a Title X fund is not in violation of the regulations.

Petitioners' attempt to distort the clear meaning of the English language as contained in the Regulations is without merit. Petitioners' view of the Secretary's attempts to enforce Congress' intent through the regulation of Title X programs is not supported by the plain reading and interpretation of the English language as contained in the Regulations. None of Petitioners' perceived interpretations of the Regulations can be supported based upon the use of the English language as contained in the Regulations.[2]

Petitioners are engaged in a futile attempt to contend that the Regulations restrict Petitioners in ways in which the express reading of the Regulations do not. Petitioners obviously hope that the Court will misread the Regulations and cast them out in their entirety without a careful analysis of what the Regulations actually say based upon a plain reading of the English language. Petitioners have been successful in convincing at least the First Circuit of their skewed interpretations of the Secretary's Regulations.

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[2]Petitioners' attempt to read into the law a congressional intent to only prohibit funds for the *performance* of abortions (Brief for Appellants before the United States Court of Appeals for the Second Circuit at 12) and that only abortion "as a method of *family planning*" are prohibited. Thus, in Petitioners' strained view, Section 1008 does not prohibit abortions for "unwanted pregnancies" (Brief for Appellants before the United States Court of Appeals for the Second Circuit at 12) or because of "inconvenience" to the mother, or if the woman is unmarried; presumably, thus, in Petitioners' view, if the woman is unmarried, no "family planning" is involved. Petitioners futilely strain the language of §1008 to limit its applicability only to the expense — "funding" — for the actual abortion procedure; thus, abortion counseling, referral, lobbying, education, advocacy, and legal action to promote abortion rights — in fact, anything other than the actual medical procedure itself — are free game for Title X projects.

*(continued...)*

## VI. THE REGULATIONS ARE NOT VAGUE, OVERBROAD, OR ARBITRARY AND CAPRICIOUS, BUT, INSTEAD, ADVANCE IMPORTANT GOVERNMENTAL INTERESTS.

Petitioners' arguments here that the Regulations are vague, overbroad, arbitrary and capricious are strikingly similar to the arguments rejected by this Court in *Bob Jones University v. United States*, 461 U.S. 574 (1983). Congress enacted the first charitable exemption statute in 1894 and had subsequently amended the statute as recently as 1954 when the status of Bob Jones University as a tax-exempt charitable organization was in question. From 1954 until 1971, the Internal Revenue Service had granted tax-exempt status to private schools without regard to the school's racial policies pursuant to 28 U.S.C. §501(c)(3). *Bob Jones University*, 461 U.S. at 578-79. Section 501(c)(3) of the Internal Revenue Code did not require entities seeking tax-exempt status as charitable organizations to have adopted non-racial discriminatory policies. However, in 1971 the IRS issued Revenue Ruling 71-447, promulgated in furtherance of 501(c)(3) – which provided that the purpose of a charitable organization "may not be illegal or contrary to public policy." *Bob Jones University*, 461 U.S. at 580. Nothing in the actual statute indicated that Congress intended an organization to be prohibited from achieving charitable status if the organization's actions were contrary to public policy. Nevertheless,

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*(continued...)*

Petitioners offer the Court no cognizable evidence of this peculiar interpretation of Congress' intent. The legislative history fails to support Petitioners' novel view of the Congressional intent embodied in §1008. Petitioners fail to support any of their suppositions by references to any statements in the legislative history or even any reasonable interpretations of the legislative history itself.

As an example of Petitioners' interpretation of §1008, Petitioners state in their Second Circuit Brief that "[i]f discussed, abortion is described as an option for terminating an unwanted pregnancy, not as a method for family planning." Thus, it is clear that Petitioners' position is that by avoiding any mention of abortion as a family planning method, Petitioners can avoid Congress' prohibition in §1008. Therefore, Petitioners could counsel or actually perform an abortion to terminate an "unwanted pregnancy" so long as it was not for the purpose of "family planning." Petitioners' semantical interpretation of Congressional intent in §1008 exhibits the degree to which Petitioners will go in order to circumvent Congress' intent and the literal prohibitions of §1008.



despite the absence of clear Congressional intention from the statute itself, this Court did not hesitate in finding that the Internal Revenue Service Regulations were in furtherance of Congress' intent to prohibit charitable organizations from engaging in activities that are "contrary to public policy." The University's arguments that Revenue Ruling 71-447 was vague, overbroad and arbitrary and capricious because there was no inclination in the Congressional statute that such prohibitions were intended were dismissed by this Court.

Undoubtedly, racial discrimination is against the public policy of our nation as was explained by the Court in *Bob Jones University*. Equally true, however, is that Congress has consistently expressed its intent and established a national public policy of prohibiting federal funding of abortions and abortion-related activities. Given the expressed prohibition of funding for abortions in Section 1008 of 42 U.S.C. §300a-6 and Congress' consistent restriction of the use of federal funds in Medicaid programs through the adoption and readoption of the Hyde Amendment, it is clear that Congress has adopted a national public policy forbidding the use of public funds for the providing of abortions and abortion-related services. Therefore, since the Regulations in question are in furtherance of Congress' clearly expressed national policy of nongovernment funding of abortions, they are not arbitrary and capricious and withstand Petitioners' challenge.

## CONCLUSION

For all the reasons set forth above, Respondent respectfully requests this Court affirm the judgment of the court below.

Respectfully submitted,

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